administrator, as distinct from an executor, derives his title as such from the grant of the letters of administration to him is shown by the case of *Meyappa Chetty* v. *Supramanian Chetty*.[7] The Judicial Committee of the Privy Council said (at pages 608-9): —

"It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, *including all rights of action* vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled: see *Comyn's* Digest, 'Administration,' B.9 and 10; *Thompson* v. *Reynolds*, 3 C. & P. 123; *Woolley* v. *Clark*, 5 B. & Ald. 744."

This passage also confirms the view that personal property of a deceased includes all rights of action. In my opinion, an authentication made under section 14(1) of the Ordinance has the effect of a grant by the Probate Officer in respect of the assets of the deceased specified in the schedule to such authentication (see section 14(3)). There is nothing in the Ordinance to say that any such authentication shall have retrospective effect. The case of *Burns* v. *Campbell, supra,* would appear to support this view. Reference may also be made to section 158 of the Sabah Probate and Administration Ordinance (Cap. 109), which requires sealing of certain grants, and upon such sealing being made, the probate or letters of administration shall thereupon be of the like force and effect, and have the same operation in Sabah as if granted by the High Court. In *Haji Akhbar Khan* v. *D. Patel (f),*[8] it was held, *inter alia,* by the Court of Appeal sitting at Jesselton, that as the respondent's Indian certificate of representation had not been re-sealed at the time when she purported to act on behalf of the deceased's estate, the whole proceedings were a nullity from the outset. The subsequent re-sealing and registration of the certificate could not validate the proceedings from the outset. At page 144 in the same report, Sir John Ainley C.J. said: "It is quite clear that the re-sealing of Mrs. Patel's Indian certificate had no retrospective effect..."; and at page 147, Smith S.P.J. stated: "A nullity is a still-born thing and I do not think, on the authorities, that the subsequent re-sealing of Mrs. Patel's Indian succession certificate had the effect in law of resurrecting something that was dead." Hence, retrospective operation of a re-sealing or authentication (as in this case) under a statute can only arise if that is expressly provided for in the statute concerned, or arises by necessary implication. It is not possible to hold that such is the case here. Accordingly, even on the assumption that the authentication in this case has been properly made under section 14(1) of the Ordinance, I hold that such an authentication took effect from the day on which it was made and has no retrospective effect. On the information of counsel for the plaintiff that such an authentication was made on 11 December 1973, that is, after the institution of the proceedings in this case, it follows that on the date of the institution of these proceedings, the plaintiff had no title to sue. Accordingly, on this ground also, I hold that the writ is a nullity.

For the reasons given above, I hold that the defendant succeeds in his motion and I hereby make an order in terms as prayed for in the motion.

Order accordingly.

FOONG WENG TAT v. VU SIEW CHIN

[F.C. (Ali, Ong Hock Sim & Raja Azlan Shah F.JJ.) January 28, 1974]
[Ipoh — Federal Court Civil Appeal No. 80 of 1973]

Practice and Procedure — Summary judgment — Leave to defend — Doubt as to bona fides of defence — Leave to defend should be conditional — R.S.C. 1957, O.14.

In this case the appellant had brought an action against the respondent on a debt due under a written agreement. The appellant applied for summary judgment but leave to defend was given to the respondent and on appeal this was affirmed in the High Court. The appellant appealed to the Federal Court.

Held: as it had been shown that there was doubt as to the *bona fides* of the defence case, leave to defend should have been made conditional on the respondent depositing the amount claimed in court.

FEDERAL COURT.

Lim Kean Chye (*Miss Leow* with him) for the appellant.

H. L. Teoh for the respondent.

Ali F.J.: We allowed this appeal and now give our reasons.

The appeal arose out of an order by the Assistant Registrar, High Court Ipoh granting the respondent unconditional leave to defend the action against him. The claim is founded on a debt due from the respondent under a written agreement. The respondent admitted signing the agreement but denied liability on grounds, namely, lack of certainty, implied recission, a mistake of fact and a breach of contract by the appellant. The writ being specially endorsed and taking the view that there was no defence to the claim the appellant applied for summary judgment. In his affidavit he dealt with the various grounds of defence raised. On the defence allegation of breach of contract for having failed to hand over or transfer four shares in West Lake Timber Sendirian Berhad, he referred to a letter from the respondent dated January 23, 1971 in which she acknowledged receiving the share transfer forms of the four shares. In her counter-affidavit she said she could not remember signing the letter although she admitted that the signature was hers. Notwithstanding this point against her the Assistant Registrar made an order in the following terms:

"Unconditional leave to defend granted. (Issue similar to those in C.S.196/71. Security already furnished there). Costs in the cause."

The appellant appealed to the High Court asking that the order be made conditional. Wan Hamzah J. dismissed the appeal taking the view that there are triable issues to go to trial. He also said that there was no evidence to show that the defence was a sham. In cases of this nature it is well established that sum-

mary judgment under O.14 will not be granted if there is a triable issue to go to trial. This is so even if the merit of the defence case is not apparent from the defence filed or from the affidavit showing cause. Here it has clearly been shown that there is doubt as to the *bona fides* of the defence case and it was, therefore, only right or just that the defendant be asked to furnish security. That is to say, leave to defend should have been conditional. We say nothing of the matters raised in the pleadings but we are of the view that in the circumstances of this particular case the Assistant Registrar erred in not making the order conditional.

Accordingly, we allowed this appeal with costs and directed that leave to defend granted is conditional on the respondent depositing the amount claimed into court within one month.

Appeal allowed.

Solicitors: *Lim Kean Chye & Co.; H. L. Teoh & Co.*

AHMAD BIN ISHAK v. PUBLIC PROSECUTOR

[A.Cr.J. (Arulanandom J.) February 22, 1974]
[Kuantan — Criminal Appeal No. 9 of 1973]

Penal Code, s. 414 — Stolen property — Cheque — Presumption from possession of stolen property — Evidence Act, s. 114.

The appellant, a penghulu, was convicted on the charge that he voluntarily assisted in disposing of a cheque valued at $2,000.90 which he knew or had reason to believe to be stolen property thereby committing an offence punishable under the Penal Code. The cheque had been handed to the appellant by an office boy. It was a government cheque, crossed, and had been made out in the name of another person. The appellant had taken the cheque to a goldsmith's shop and had purchased gold ornaments and had taken the balance in cash. He was sentenced by the lower court to twelve months imprisonment. On appeal by the appellant against conviction and sentence.

Held: (1) there was no doubt that the cheque was stolen;

(2) the accused knew that the person from whom he had obtained the cheque was a mere office boy and that the sum made out thereon was considerable;

(3) there was sufficient cause for the accused to have reason to believe that the cheque was stolen and the conduct of the accused tended to show that the cheque was stolen;

(4) the presumption under section 114 of the Evidence Act was correctly applied.

Observations on the sentencing of an offending Government servant.

Case referred to:-

(1) *Mavji Nanji* v. *Emperor* A.I.R. 1941 Bom. 325, 326.

CRIMINAL APPEAL.

K. Chandra for the appellant.

Lamin bin Hj. Mohamed Yunus (Deputy Public Prosecutor) for the respondent.

Arulanandom J.: This is an appeal from the decision of the learned magistrate, Kuantan, on the 24th May, 1973, wherein the appellant was convicted on the charge that he at Tai Kong Gold Smith, No. 72, Main Street, Kuantan, in the District of Kuantan, in the State of Pahang, voluntarily assisted in disposing of property, to wit, one cheque No. 58766 valued at $2,000.90, which he knew or had reason to believe to be stolen property, and whereby he committed an offence punishable under section 414 of the Penal Code, and was sentenced to twelve months' imprisonment.

The appellant has in his grounds of appeal enumerated six grounds but this has been summarised by counsel for the appellant in his arguments. First and foremost, it cannot be denied that cheque No. 58766 valued at $2,000.90 was stolen. You have the evidence of PW1 Abdul Hamid bin Hussain that the cheque should have rightly been paid to him but that he did not receive it. Again, PW3 states in his evidence that he made out the cheque and passed it to the despatch clerk together with the vouchers and other documents. The despatch clerk (PW4) put the cheque in an envelope and wrote the address on the envelope for despatch but did not gum it. The normal procedure in the office was for the cheques to be handed in that form to the office boy whose duty it was to seal the envelope and then send it to the post office for mailing. The fact that Abdul Hamid did not get it could only mean that either it was stolen or that it was lost in the post. If it was lost in the post, then, either it would have gone to the Dead Letter Office and returned to the Treasury or would have disappeared for good and not reappeared in anybody else's possession. Since it did not disappear completely and since it was not returned to the Dead Letter Office the only conclusion which one could arrive at is that at some stage after the despatch clerk put it in the envelope, addressed it, did not seal it and gave to the office boy, it was stolen. It is not necessary to decide now at which stage it was stolen but defence counsel seems to agree that the cheque was stolen because he put several times to PW5 that he was the one who stole the cheque. So now as I see it there is no doubt from the evidence of the prosecution that this cheque was stolen.

The next bit of evidence is that the accused cashed the cheque by purchasing some jewellery and receiving the balance of the amount of the cheque in cash. Now counsel for the appellant has argued that since there was a lapse of about 7 or 8 days between issue of the cheque and encashment by the accused the period of time was too long for the presumption under section 114 of the Evidence Ordinance to be invoked. But, even if one looks at the authority which counsel for the appellant cited, the case of *Mavji Nanji* v. *Emperor*[1] Lord Beaumont C.J. on the question of period of time before the presumption in section 114 can be invoked says:

"The court is not bound to draw this presumption, and the court must always ask itself whether in the circumstances of the particular case the presumption is one which in fairness to the accused can be drawn. When one is dealing with property of some value, and it is very unlikely that the man, from whom the accused got it, had come by it honestly; or when one is dealing with property stolen in a village where there are not likely to be many dealings in it, the presumption may be drawn more readily than in the case of a theft in a city like Bombay,..."

Now in this case this was a cheque which was given for $2,000.90. It was a large amount and the person (an office boy) who gave it to the accused is not likely to have come by it. Therefore, in my view, the presumption was correctly invoked under section 114 because the accused was in possession of a government cheque and he cashed it soon after it was given and he received consideration and it was a stolen